Yeoh Jin Aik & Anor v HSBC Bank (M) Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(W)-2056–11 OF 2016 AND W-02(NCC)(W)-2057–11 OF 2016

TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH YUSOF JJCA

30 MARCH 2018

Banking — Banker and customer — Action by customer against banker — Whether bank could invoke estoppel or acquiescence to exculpate itself of liability for losses suffered, as consequence of forging of documentation by bank's own employee — Whether issue of forgery and PCF fund not being capital guaranteed were two separate and discrete issues — Whether appellants' loss due to forgery by bank's employee — Whether bank could not commit forgery because it was personal offence — Whether appellants bound by exclusion clause or non-reliance clause — Whether evidence of intention to deceive an essential ingredient in establishing misrepresentation

The sole issue for consideration in the present appeals was whether a bank could invoke estoppel or acquiescence to exculpate itself of liability for losses suffered, as a consequence of the forging of documentation by the bank's own employee. The estoppel relied upon by the bank in the present appeals comprised of: (a) clauses in the Bank's Investment Instruction Form which authorised investment transactions; and (b) monthly statements issued by the bank to both its customers setting out the transactions that were undertaken on their behalf by the bank over a period of some three years. The trial judge found that estoppel and/or acquiescence comprised a good defence to the customers' claims for losses, notwithstanding forgery by the bank's own employee. The learned trial judge further found that: (i) the issue of forgery and whether the appellants were aware of the PCF investment not being capital guaranteed were two independent and discrete issues; (ii) the cause of the appellants' loss was not the forgery but rather that the PCF was not capital guaranteed; (iii) even if the signatures were forged, but if the fund were capital guaranteed, the appellants would not have suffered loss and would not have complained; (iv) the appellants were not entitled to a declaration that the bank had committed forgery because forgery was a 'personal' offence and accordingly the bank could not be responsible for the forgery; (v) the bank was not liable contractually by reason of the non-reliance clause in the Investment Instruction Form, which was signed by the appellants; and (vi) the cause of action founded in misrepresentation also failed for failure to establish the essential ingredient of an intention to deceive on the part of Carren Wong.

Aggrieved by the decision, the appellants filed the present appeals. The bank had filed a cross-appeal and submitted that the learned trial judge had erred in finding that the signatures on other requisite banking documentation were not those of the customers and had been forged by the bank's employee.

Held, allowing both the appeals with costs; dismissing the cross-appeal with costs; and setting aside the High Court orders:

(1) There was a clear finding of fact by the learned trial judge that the bank's employee, Carren Wong had forged the appellants' signatures on various banking documentation. The court was not persuaded that it should interfere with the clear findings of fact. The court's view was bolstered by a consideration of the evidence of the bank's own employees who all agreed that the signatures were clearly mismatched. Further, the expert reports also supported the high probability of forgery. It could not be said in these circumstances that the learned judge was 'plainly wrong' in her conclusion. Therefore, the court had dismissed the cross-appeal on the finding of forgery (see paras 7–8).

(2) The court disagreed with the learned trial judge that the issues of forgery and the PCF fund not being capital guaranteed to the knowledge of the appellants, were two separate and discrete issues. On the contrary, the two matters were intertwined both in terms of fact and law. The issue of forgery was a fundamental issue that affected the appellants' mandate given to the bank. The effect of the forgery was to vitiate the mandate given by the appellants. This was because the appellants had not in fact given their consent or authorisation for investment in the PruAsia select fund, or for any such switching to this fund or any top-up either. It was Carren Wong and not the appellants who had consented or authorised the transaction. To that extent all those investments were unauthorised (see para 16).

(3) The learned judge also erred in stating that the appellants' loss was caused by reason of the PCF fund not being capital guaranteed, rather than the forgery. It was apparent that the appellants could not have known that the PCF fund was not capital guaranteed because the account opening forms for this investment fund contained the forged signatures of the appellants. Thus, the loss could not be attributed to the fact that the subject fund was not capital guaranteed. The probable cause of the loss was the forgery of the primary essential documents relating to the investment (see paras 18 & 20).

(4) The fact that the appellants did not protest or object over a period of three and a half years when the bank's statements were received by them, did not amount to an estoppel or acquiescence. In the present case, mere silence on the part of the appellants upon receipt of statements was insufficient to amount to an estoppel because: (a) there was simply no

representation from the appellants; and (b) the bank was not induced as a consequence of their silence to act to its own detriment. On the contrary, it was the appellants who had suffered loss and detriment (see paras 21–23).

(5) The learned judge had no evidential basis to make a speculative finding that if the PruAsia select fund was in fact capital guaranteed, the appellants would not have complained about the forgery because they would not have suffered loss (see para 24).

(6) The learned judge had erred in finding that the bank could not commit forgery because it was a 'personal' offence. This was because the bank was a person for the purposes of the Interpretation Acts 1948 and 1967. In any event, in view of the finding that Carren Wong as the employee of the bank had committed forgery, it followed that the bank, as principal, was liable for the acts of its employee, who was the agent (see para 26).

(7) On the issue of the exclusion or non-reliance clause, the evidence disclosed that the relevant clauses relating to the PruAsia fund were contained in the documents that were forged. The appellants did not sight these documents. Therefore, the appellants could have no knowledge of these documents, far less the non-reliance or exclusion clause. It followed that this clause could not therefore bind them (see para 27).

(8) On the issue of a lack of evidence of an intention to deceive on the part of Carren Wong in order to establish misrepresentation, the learned judge erred because that was not an essential ingredient in establishing misrepresentation under the Contracts Act 1950 or the common law, in a civil law action (see para 28).

[Bahasa Malaysia summary

Isu utama untuk pertimbangan dalam rayuan ini adalah sama ada bank boleh menggunakan estopel atau persetujuan untuk melepaskan diri dari liabiliti untuk kerugian yang dialami, akibat daripada pemalsuan dokumentasi oleh pekerja bank sendiri. Estopel yang digunakan oleh bank dalam rayuan kini terdiri daripada: (a) klausa-klausa dalam Borang Arahan Pelaburan Bank yang membenarkan transaksi pelaburan; dan (b) penyata bulanan yang dikeluarkan oleh bank kepada kedua-dua pelanggannya yang menetapkan transaksi-transaki yang dilakukan bagi pihak mereka oleh pihak bank selama tempoh tiga tahun. Hakim perbicaraan mendapati bahawa estopel dan/atau persetujuan merupakan pembelaaan yang baik untuk tuntutan pelanggan untuk kerugian, walaupun pemalsuan oleh pekerja bank sendiri. Hakim percubaan yang bijaksana selanjutnya mendapati bahawa: (i) isu pemalsuan dan sama ada perayu-perayu mengetahui tentang pelaburan PCF yang bukan modal dijamin adalah dua isu berasingan dan berbeza; (ii) kausa kerugian perayu bukanlah pemalsuan tetapi PCF yang bukan modal dijamin; (iii)

walaupun tandatangan itu dipalsukan, tetapi jika dana itu modal dijamin, perayu-perayu tidak akan mengalami kerugian dan tidak akan mengadu; (iv) perayu-perayu tidak berhak kepada deklarasi bahawa bank telah melakukan pemalsuan kerana pemalsuan adalah kesalahan 'peribadi' dan oleh itu bank tidak boleh bertanggungjawab untuk pemalsuan itu; (v) bank tidak bertanggungan secara kontrak oleh sebab klausa ketidakbergantungan dalam Borang Arahan Pelaburan, yang ditandatangani oleh perayu; dan (vi) kausa tindakan yang diasaskan dengan salah nyataan juga gagal kerana kegagalan untuk mewujudkan elemen penting berhubung niat untuk menipu di pihak Carren Wong. Terkilan dengan keputusan itu, perayu-perayu telah memfailkan rayuan-rayuan ini. Bank telah memfailkan tuntutan balas dan berhujah bahawa hakim perbicaraan yang bijaksana telah terkhilaf kerana mendapati bahawa tandatangan-tandatangan pada dokumen-dokumen perbankan bukan tandatangan pelanggan-pelanggan dan telah dipalsuan oleh pekerja bank itu.

Diputuskan, membenarkan kedua-dua rayuan dengan kos; menolak rayuan balas dengan kos; dan mengetepian perintah-perintah Mahkamah Tinggi:

(1) Terdapat penemuan fakta yang jelas oleh hakim perbicaraan yang bijaksana bahawa pekerja bank, Carren Wong telah memalsukan tandatangan-tandatangan perayu-peryau pada pelbagai dokumen-dokumen perbankan. Mahkamah tidak dipohon agar tidak patut campur tangan dengan penemuan fakta yang jelas. Pendapat mahkamah diperkuatkan dengan pertimbangan berhubung keterangan pekerja bank sendiri yang kesemuanya bersetuju bahawa tandatangan-tandatangan itu jelas tida sepadan. Selanjutnya, laporan-laporan pakar juga menyokong kebarangkalian tinggi pemalsuan. Ia tidak boleh dikatakan dalam keadaan berikut bahawa hakim yang bijaksana telah 'plainly wrong' dalam kesimpulannya. Oleh demikian, mahkamah telah menolak rayuan balas berhubung penemuan tentang pemalsuan itu (lihat perenggan 7–8).

(2) Mahkamah tidak bersetuju dengan hakim perbicaraan bahawa isu-isu pemalsuan dan dana PCF bukan modal dijamin pada pengetahuan perayu, adalah dua isu yang berasingan dan berbezat. Sebaliknya, kedua-dua perkara itu saling berkaitan dari segi fakta dan undang-undang. Isu pemalsuan adalah isu asas yang menjejaskan mandat perayu yang diberikan kepada bank. Kesan pemalsuan itu adalah untuk menghapuskan mandat yang diberikan oleh perayu-perayu. Ini kerana perayu-perayu sebenarnya tidak memberi persetujuan atau kebenaran untuk pelaburan dalam PruAsia dana pilihan, atau untuk apa-apa pertukaran kepada dana ini atau mana-mana top-up sama ada. Ia adalah Carren Wong dan bukan perayu-perayu yang telah mengizinkan atau membenarkan transaksi itu. Setakat ini semua pelaburan tersebut tidak dibenarkan (lihat perenggan 16).

(3) Hakim yang bijaksana juga terkhilaf dalam menyatakan bahawa kerugian perayu adalah disebabkan oleh dana PCF bukan modal dijamin, dan bukannya pemalsuan. Adalah jelas bahawa perayu-perayu tidak dapat mengetahui bahawa dana PCF bukan modal dijamin kerana borang pembukaan akaun untuk dana pelaburan ini mengandungi tanda tangan palsu perayu-perayu. Oleh itu, kerugian itu tidak dapat dikaitkan dengan hakikat bahawa dana subjek adalah suatu modal yan tidak dijamin. Sebab kemungkinan kerugian adalah pemalsuan dokumen penting utama yang berkaitan dengan pelaburan (lihat perenggan 18 & 20).

(4) Hakikat bahawa perayu-perayu tidak protes atau membantah sepanjang tempoh tiga setengah tahun apabila penyata-penyata bank itu diterima oleh mereka, bukan merupakan suatu estopel atau persetujuan. Dalam kes ini, sikap berdiam diri di ihak perayu-perayu setelah menerima penyata-penyata itu tidak mencukupi untuk merupakan suatu estopel kerana: (a) tiada representasi langsung daripada perayu-perayu; dan (b) bank tidak dianggap sebagai akibat daripada sikap berdiam diri mereka untuk bertindak terhadap kerugiannya sendiri. Sebaliknya, ia adalah peryau-perayu yang mengalami kerugian dan terjejas (lihat perenggan 21–23).

(5) Hakim yang bijaksana tiada asa keterangan untuk membuat penemuan spekulatif bahawa jika dana pilihan PruAsia sememanganya modal dijamin, perayu-perayu tidak mungkin mengadu tentang pemalsuan itu kerana mereka tidak mengkin mengalami kerugian (lihat perenggan 24).

(6) Hakim yang bijaksana telah terkhilaf kerana mendapati bahawa bank itu tidak mungkin melakukan pemalsuan oleh sebab ia adalah suatu 'personal offence'. Ini adalah kerana bank itu adalah seseorang bagi tujuan Akta Tafsiran 1948 dan 1967. Dalam apa keadaan, berdasarkan penemuan bahawa Carren Wong sebagai pekerja bank itu telah melakukan pemalduan, adalah diikuti yang bank itu, sebagai principal, adalah bertanggungjawab terhadap tindakan-tindakan pekerjanya, yang merupakan ejen (lihat perenggan 26).

(7) Berhubung isu klausa pengecualian atau ketidakbergantungan, keterangan menunjukkan bahawa klausa-klausa relevan berkaitan dana PruAsia itu terkandung dalam dokumen-dokumen yang telah dipalsukan. Perayu-perayu tidak menandatangani dokumen-dokumen tersebut. Oleh itu, perayu-perayu tidak mungkin mempunyai pegetahuan tentang dokumen-dokumen tersebut, apatah lagi tentang klausa ketidakbergantugnan atau pengecualian itu. Ia diikuti bahawa klausa ini tidak boleh dengan itu mengikat mereka (lihat perenggan 27).

(8) Berhubung itu ketiadaan keterangan berhubung niat untuk menipu di pihak Carren Wong bagi tujuan membuktikan salah nyataan, hakim yang bijaksana terkhilaf kerana ia bukan elemen yang penting untuk

membuktikan salah nyataan di bawah Akta Kontrak 1950 atau undang-undang am, dalam tindakan undang-undang sivil (ihat perenggan 28).]

Notes

For cases on action by customer against banker, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2559–2568.

Cases referred to

Greenwood v Martin's Bank, Ltd [1932] All ER Rep 318; [1933] AC 51, HL (refd)

Jiang Ou v EFG Bank AG [2011] 4 SLR 246; [2011] SGHC 149, HC (refd)

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others [1985] 2 All ER 947; [1985] 2 Lloyds Rep 313; [1985] 3 WLR 317; [1986] AC 80; [1985] UKPC 22, PC (refd)

Legislation referred to

Contracts Act 1950
Interpretation Acts 1948 and 1967 s 3
Penal Code

M Thayalan (Thayalan & Assoc) for the appellants.
Benjamin Dawson (Ooi Ai Yen, Ng Juen Yee and Quay Hui Shien with him) (Benjamin Dawson) for the respondent.

Nallini Pathmanathan JCA:

[1] The singular issue for consideration in this case is whether estoppel or acquiescence is available as a defence to a bank in respect of losses incurred by the bank's customers, as a consequence of forgery committed by the bank's own employee in executing, inter alia, account opening forms in relation to a portfolio of investments?

[2] In other words, can a bank invoke estoppel or acquiescence to exculpate itself of liability for losses suffered, as a consequence of the forging of documentation by the bank's own employee?

[3] The estoppel relied on by the bank by way of defence to the forgery in the instant appeal comprises:

(a) clauses in the bank's investment instruction form which authorise investment transactions; and

A (b) monthly statements issued by the bank to both its customers setting out the transactions that were undertaken on their behalf by the bank over a period of some three years.

B **[4]** The trial judge found that estoppel and/or acquiescence comprised a good defence to the customers' claims for losses, notwithstanding forgery by the bank's own employee.

C **[5]** The customers who comprise the appellants in the two appeals before us contend otherwise, hence the present appeals. The bank has filed a cross-appeal maintaining that while the learned trial judge was correct in concluding that the bank was not liable, nonetheless the learned trial judge had erred in finding that the signatures on other requisite banking documentation were not those of the customers, and had been forged by the bank's employee, who was the relationship manager delegated to manage and take care of these customers' portfolio of accounts.

D

[6] Having perused the appeal records and considered the submissions we are of the unanimous view that the appeals should be allowed and the cross-appeal dismissed for, inter alia, the reasons set out below.

E

[7] There is a clear finding of fact by the learned trial judge that the bank's employee, Carren Wong ('PW7'), the relationship manager of the plaintiffs, had forged the plaintiffs' signatures on various banking documentation including the unit trust account opening forms, and other ancillary documents. A large number of banking documents particularly the unit trust account opening forms and terms and conditions, business guide, the top-up documentation and the switch from PCF to PruAsia select fund were found to be forged by the learned trial judge.

F

G

[8] We have considered the submissions of learned counsel for the bank in relation to the cross-appeal and are not persuaded that we should interfere with the clear findings of fact. We are bolstered in our view by a consideration of the evidence of the bank's own employees who all agreed that the signatures were clearly mismatched. Further to this, the expert report also supports the high probability of forgery. It cannot be said in these circumstances that the learned judge was 'plainly wrong' in her conclusion. Therefore we dismiss the cross-appeal on the finding of forgery.

H

I **[9]** Having concluded that forgery has been established it now falls to be considered whether, the learned judge was correct when she held, inter alia, that: 'The finding of forgery of the plaintiffs' signatures does not negate a concurrent finding of fact that the plaintiffs were aware that the PCF investment is not capital guaranteed'. She further concluded that the issue of

forgery and whether the plaintiffs were aware of the PCF investment not being capital guaranteed are two independent and discrete issues.

[10] She also found that the cause of the plaintiffs' loss was not the forgery but rather that the PCF was not capital guaranteed.

[11] Her Ladyship further speculated that even if the signatures were forged, but if the fund were capital guaranteed, the plaintiffs would not have suffered loss and would not have complained.

[12] She concluded that the plaintiffs were not entitled to a declaration that the bank had committed forgery because forgery is a 'personal' offence and accordingly the bank could not be responsible for the forgery.

[13] Finally the learned trial judge also concluded that the bank was not liable contractually by reason of the non-reliance clause in the investment instruction form, which was signed by the plaintiffs. That clause reads as follows:

> I/We also confirm that I/we independently and without reliance on the Bank made my/our own judgment and decision with respect to the investments. The Bank shall be under no liability whatsoever in respect of any information or recommendation rendered by any of its employees irrespective of whether or not such recommendation was given.

[14] Her Ladyship also found that the cause of action founded in misrepresentation as pleaded by the customers also failed for failure to establish the essential ingredient of an intention to deceive on the part of the relationship manager.

[15] We are of the view that the learned judge fell into grave error when she made these findings and conclusions.

[16] Firstly, we do not concur with the learned trial judge that the issues of forgery, and the PCF fund not being capital guaranteed to the knowledge of the plaintiffs, are two separate and discrete issues. On the contrary, the two matters are intertwined both in terms of fact and law. The issue of forgery is a fundamental issue that affects the plaintiffs' mandate given to the bank. The effect of the forgery is to vitiate the mandate given by the plaintiffs (see *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246; [2011] SGHC 149). This is because the customers had not in fact given their consent or authorisation for investment in the PruAsia select fund, or for any such switching to this fund or any top-up either. It was Carren Wong and not the plaintiffs who had

consented or authorised the transaction. To that extent all those investments were unauthorised.

[17] It is not possible to sever the forgery from the far less important issue of whether or not the plaintiffs were aware that the PruAsia select fund was not capital guaranteed. The latter is merely an ancillary point whereas the fundamental or primary issue is the fact of, and consequences of the forgery.

[18] On the issue of the cause of the plaintiffs' loss, the learned judge also erred in stating that the loss was caused by reason of the PCF fund not being capital guaranteed, rather than the forgery. It is apparent that the plaintiffs could not have known that the PCF fund was not capital guaranteed because the account opening forms for this investment fund contains the forged signatures of the plaintiffs. If their signatures were forged, they could not know whether it was capital guaranteed or not. Neither could they have authorised investments in the accounts. This deals with the switching of accounts from Prudential Country Fund to PruAsia select fund.

[19] This applies equally to the top up transactions, where the documentation was similarly forged.

[20] Therefore the loss could not be attributed to the fact that the subject fund was not capital guaranteed. The probable cause of the loss is the forgery of the primary essential documents relating to the investment. The evidential record supports our conclusion.

[21] The fact that the plaintiffs did not protest or object over a period of three and a half years when the bank's statements were received by them, does not amount to an estoppel or acquiescence (see *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others* [1985] 2 All ER 947; [1985] 2 Lloyds Rep 313; [1985] 3 WLR 317; [1986] AC 80; [1985] UKPC 22) (Hong Kong)). 'Mere silence or inaction cannot amount to a representation unless there be a duty to disclose or act: see *Greenwood v Martin's Bank, Ltd* [1932] All ER Rep 318 at p 321; [1933] AC 51 at p 57. And Their Lordships would reiterate that unless conduct can be interpreted as amounting to an implied representation, it cannot constitute an estoppel: for the essence of estoppel is a representation (express or implied) intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss' (see *Greenwood*'s case, above).

[22] Here mere silence on the part of the plaintiffs upon receipt of statements is insufficient to amount to an estoppel because:

(a) there was simply no representation from the plaintiffs; and

(b) the bank was not induced as a consequence of their silence to act to its own detriment.

[23] On the contrary, it was the plaintiffs who have suffered loss and detriment.

[24] On the speculation that if the PruAsia select fund was in fact capital guaranteed, the plaintiffs would not have complained about the forgery because they would not have suffered loss, Her Ladyship had no evidential basis on which to make such a speculative finding.

[25] With respect to the bank being unable to commit forgery because it is a 'personal' offence, the learned trial judge erred because the bank is a person for the purposes of the Interpretation Acts 1948 and 1967 (see s 3) where a person is defined to include '… a body of persons, corporate or incorporate' and the Penal Code where the definition of a person includes '… any company or association or body of persons, whether incorporated or not'.

[26] Further, and in any event, in view of the finding that Carren Wong (PW7) as the relationship manager and thereby an employee of the bank had committed forgery, it follows that the bank, as principal, is liable for the acts of its employee, who is the agent. She was moreover acting well within the scope of her authority when she committed such forgery.

[27] On the issue of the exclusion or non-reliance clause, the evidence discloses that the relevant clauses relating to the PruAsia Fund were contained in the documents that were forged. The plaintiffs did not sight these documents. Neither did they sight the relevant prospectuses or brochures. Therefore the plaintiffs could have no knowledge of these documents, far less the non-reliance or exclusion clause. It follows that this clause cannot therefore bind them. Moreover the clause excludes liability for information or recommendations made by employees of the bank. It does not expressly exclude liability for the forgery of its employees.

[28] Finally, on the issue of a lack of evidence of an intention to deceive on the part of Carren Wong (PW7) in order to establish misrepresentation, the learned judge erred because that is not an essential ingredient in establishing misrepresentation under the Contracts Act 1950 or the common law, in a civil law action.

[29] For these reasons we are satisfied that appellate intervention is required and we therefore allow both appeals with costs. We also dismiss the cross-appeal with costs.

[30] The High Court orders are set aside.

Both appeals allowed with costs; cross-appeal dismissed with costs; High Court orders set aside.

Reported by Dzulqarnain Ab Fatar